

Chapter 12: Prevention and Elimination of Harassing Conduct in the Workplace

Section 1. PURPOSE

This chapter establishes the National Indian Gaming Commission's ("NIGC") anti-harassment policy and procedures to help the NIGC maintain a workplace free from unlawful harassment. This chapter defines harassing conduct, outlines the rights and responsibilities of NIGC employees, requires periodic training on harassment and this chapter, and establishes a system of accountability for ensuring a workplace free from unlawful harassment. Unlike other forms of discrimination, harassment is typically cumulative in nature: one offensive remark will seldom be illegal, but it can become illegal if similar incidents are allowed to recur. These procedures ensure that appropriate NIGC officials are notified of, and have the opportunity to promptly correct, hostile or abusive conduct that is, or has the potential to become, so severe or pervasive as to constitute a legal claim of harassment. This chapter is a part of the NIGC's ongoing efforts to provide a model workplace for its employees.

Section 2. AUTHORITY

- a. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16;
- b. Age Discrimination in Employment Act, 29 U.S.C. § 633a;
- c. Rehabilitation Act, 29 U.S.C. § 791(g);
- d. Civil Service Reform Act, 5 U.S.C. § 2302(b)(10); and
- e. Executive Order 11478, as amended May 28, 1998.

Section 3. POLICY

- a. **Zero tolerance for harassment, discrimination, and retaliation.**

It is the NIGC's policy to maintain a model workplace free from harassment and other forms of discrimination based on race, color, religion, sex, national origin, age, disability, and sexual orientation. Accordingly, the NIGC has no tolerance for harassment or any other form of unlawful discrimination.

In addition, the NIGC will not tolerate retaliation against any employee for reporting matters under this policy or for assisting in any inquiry about such a report.

- b. **Definition of unlawful harassment.**

Unlawful harassment includes unwelcome intimidation, ridicule, insult, comments, or physical conduct based on race, color, religion, sex (whether or not of a sexual nature), national origin, age, disability, sexual orientation, or retaliation where:

- (1) an employee's acceptance or rejection of such conduct explicitly or implicitly forms the basis for an employment decision affecting the employee; or
- (2) the conduct is sufficiently severe or pervasive as to alter the terms, conditions, or privileges of the employee's employment, or otherwise create an abusive or hostile work environment. This type of harassment typically does not involve discrete personnel actions such as denial of a promotion.

c. Conduct covered by this chapter.

The conduct covered by this chapter is broader than the legal definition of unlawful harassment listed above. It includes hostile or abusive conduct based on an employee's race, color, religion, sex (whether or not of a sexual nature), national origin, age, disability, sexual orientation, or retaliation, even if the conduct has not yet risen to the level of illegality. This is because the goal of this chapter is to avoid—or at least limit—harm to any employee subjected to unwelcome hostile or abusive conduct based on a protected characteristic by ensuring that appropriate NIGC officials are notified of, and have the opportunity to promptly correct, such conduct before it becomes so severe or pervasive as to violate the law, or as soon as possible thereafter.

Section 4. RESPONSIBILITIES

a. The NIGC Chief of Staff, or his/her deputy, is responsible for:

- Disseminating this chapter to all employees on an annual basis and periodically reminding employees of their responsibilities under this chapter.
- Developing and providing periodic training for all employees on this chapter and its requirements.
- Developing a performance measure in compliance with this chapter; ensuring that performance plans of all supervisors and managers include a performance measure addressing compliance with this chapter; and ensuring that supervisors and managers are appropriately rated on the measure.
- Receiving reports alleging violations of this chapter and, as described in Section 5 of this chapter, making or directing further inquiries into such reports, as appropriate and necessary.

- Providing oversight, technical assistance, and support to NIGC staff to assure compliance with this chapter.
- Maintaining a written record of reports made and actions taken pursuant to this chapter. These records are confidential and will be maintained in a secure location.
- Maintaining an e-mail address at harassment_prevention@nigc.gov to respond to inquiries from NIGC staff (or their representatives) about workplace harassment. NIGC employees shall be provided with information about the requirements of this chapter, as well as the existence of, and filing requirements for, other processes that may be available to employees seeking resolution of their disputes. All inquiries will be treated confidentially.
- Reporting to the NIGC EEO Director on the actions taken pursuant to this chapter so that the EEO Director can determine the NIGC's compliance with federal sector EEO requirements, and providing a copy of the reports, findings, and actions, as requested.

b. All NIGC staff are expected to:

- Understand their rights and responsibilities under this chapter.
- Participate in the periodic training required under this chapter.
- Refrain from engaging in hostile or abusive conduct.
- Report hostile or abusive conduct by employees or others in the workplace.
- Inform the offending employee's supervisor, or any other NIGC management official or the Chief of Staff (or his/her deputy), if subjected to unwelcome hostile or abusive conduct.
- Fully cooperate in any inquiry or investigation.

c. NIGC Division Directors, the General Counsel, supervisors, and other management officials also must:

- Ensure a workplace free of illegal harassment.
- Ensure that their subordinates are aware of this chapter and its requirements.
- Act promptly and effectively to stop hostile or abusive conduct of which they become aware.
- Notify appropriate NIGC officials of reported or observed harassing conduct, and of their efforts to correct such conduct.
- Appropriately evaluate subordinate supervisors and managers of their performance under this chapter.

d. The NIGC EEO Director is responsible for:

- Conducting the preliminary inquiry and directing any further investigation that is warranted in reports of harassment where the General Counsel, the Chief of Staff, or any of the NIGC Commissioners are implicated.
- Resolving any dispute between the Chief of Staff and the General Counsel (in matters in which the General Counsel is not implicated) regarding whether a further investigation of a report of harassment is warranted.

Section 5. PROCEDURES.

a. Reporting hostile or abusive conduct.

- (1) Any NIGC employee who has been subjected to unwelcome hostile or abusive conduct is encouraged to inform the offending person(s) responsible for the conduct that it is unwelcome and offensive, and request that the conduct cease.

If the conduct continues, or if the employee is uncomfortable confronting the offending person(s) about the conduct, he/she should report the matter to the supervisor of the employee engaging in the hostile or abusive conduct, to another supervisor or other management official, or to the Chief of Staff (or his/her deputy).

- (2) NIGC employees who know of hostile or abusive conduct directed at others are encouraged to report the matter to the supervisor of the employee engaging in the hostile or abusive conduct, to another supervisor or other management official, or to the Chief of Staff (or his/her deputy).
- (3) Initial contacts to the e-mail address will be confidential. Employees may obtain information about this chapter, or report hostile or abusive conduct to the Chief of Staff (or his/her deputy) by e-mailing harassment_prevention@nigc.gov.

NOTE: Reports made pursuant to this chapter do NOT replace, substitute, or otherwise satisfy the separate obligations of an EEO complaint, Merit Systems Protection Board (“MSPB”) appeal, or any other statutory process. Unlike this chapter, those procedures typically provide for remedial relief to the victims of a violation. For further information concerning how an NIGC employee may pursue rights under one of these separate processes, see Section 6 of this chapter.

b. Management response to harassment reports.

- (1) **Conducting preliminary inquiries.** An NIGC supervisor or manager who receives a report of, or otherwise becomes aware of, hostile or abusive conduct involving subordinates within his/her chain of command must determine:
- what conduct is at issue and whether it arguably could be considered hostile or abusive;
 - who may be involved;
 - whether any immediate corrective action is required to insulate the alleged victim from further hostile or abusive conduct; and
 - what action is necessary and appropriate to otherwise address the report.
- (2) **Notifying appropriate officials of harassment report.**
- (a) An NIGC supervisor or manager who becomes aware of allegedly hostile or abusive conduct involving employees outside of his/her chain of command must, within one (1) business day, notify the following appropriate officials:
1. The harassing employee's direct supervisor and the Division Director or, if the employees are within OGC, the General Counsel (if the conduct implicates the supervisor, Division Director, or the General Counsel, also notify the Chief of Staff (or his/her deputy)); and
 2. The victim's direct supervisor and Division Director or, if the employees are within OGC, the General Counsel (if the conduct implicates the supervisor, Division Director, or the General Counsel, also notify the Chief of Staff (or his/her deputy)).
 3. In either case, if the conduct implicates the Chief of Staff, also notify the NIGC EEO Director.
- (b) NIGC supervisors and managers who become aware of hostile or abusive conduct within their chain of command must, no later than one (1) business day following receipt of the report, notify the Chief of Staff (or his/her deputy). This notification must include a description of any initial steps taken in response to the conduct and a plan of necessary and appropriate action to address the report.
- (c) When a report is made directly to the Chief of Staff (or his/her deputy), he/she shall:

1. Immediately acknowledge receipt of the report;
2. Notify the Division(s) or Office implicated in the report, including the regional office if the report concerns a regional or satellite office; and
3. Require the offices implicated in the report to immediately conduct a preliminary inquiry and take any other necessary and appropriate action.

c. Performing further investigation.

The Chief of Staff (or his/her deputy) shall have sole discretion to decide whether further investigation is required, or if the preliminary inquiry is sufficient to determine whether corrective action is necessary. These decisions are fact specific, and must be made on a case-by-case basis.

When the Chief of Staff (or his/her deputy) determines that further investigation is necessary:

- (1) If the matter involves any division/office other than the Office of the General Counsel, the Chief of Staff (or his/her deputy) shall solely determine who will direct further investigations. The Chief of Staff (or his/her deputy) may engage other NIGC management officials from outside the involved office, or an outside investigative service if he/she deems it necessary and appropriate.
- (2) If the matter involves the Office of the General Counsel, the Chief of Staff (or his/her deputy) and the General Counsel shall, by agreement, determine who will direct further investigations. The Chief of Staff (or his/her deputy) and the General Counsel may agree to engage other NIGC management officials, or an outside investigative service if they deem it necessary and appropriate.
- (3) The investigation must be conducted swiftly, impartially, and in a manner appropriate to the allegation.
- (4) If the General Counsel, the Chief of Staff, or any of the NIGC Commissioners are directly implicated in the potentially harassing conduct, the NIGC EEO Director shall be responsible for conducting the preliminary inquiry and directing any further investigation that is warranted.
- (5) Any dispute between the General Counsel and the Chief of Staff (in matters in which the General Counsel is not implicated) regarding further investigation will be resolved by the NIGC EEO Director.

d. Taking corrective action.

If it is determined that unwelcome hostile or abusive conduct occurred, corrective action is necessary.

To determine the appropriate corrective action, the Division(s) or Office implicated in the report will consult with the Chief of Staff (or his/her deputy). In matters where the Chief of Staff is implicated, the NIGC Chair will determine the appropriate corrective action. The action necessary will depend on the severity and/or pervasiveness of the offense, the response required in order to end such conduct, the offender's disciplinary/conduct history, and other surrounding circumstances. A non-exclusive list of possible corrective actions follows.

- (1) If the conduct consisted of only occasional remarks that are arguably offensive but not severe, corrective action may consist of no more than discussing the matter with the responsible individual(s), explaining why it was inappropriate, and instructing them that it should not continue.
- (2) If more than one person has engaged in inappropriate but not severe conduct, if there is other evidence that employees are not sure about what conduct is appropriate and permissible, or if employees appear unaware of how to properly respond to such conduct, appropriate training should be provided.
- (3) If the conduct is more severe or pervasive, including frequent offensive remarks, touching, or other egregious harassing behavior, the offending employee responsible for the hostile or abusive conduct should be separated from the victim, at least until the matter otherwise can be resolved. This should not be accomplished by transferring the employee who reported or otherwise was the victim of hostile or abusive conduct. If the victim, without having been asked or prompted, specifically requests such a transfer, management should inform the employee that he/she need not leave, and that instead the employee responsible for the hostile or abusive conduct may be transferred. Nonetheless, to the extent possible, the victim's request should be honored.
- (4) For the most serious incidents, corrective action may include any disciplinary action otherwise available for violations of conduct standards, such as suspension, demotion, or removal. The NIGC EEO Director must concur on determinations that an employee's conduct has violated any of the EEO statutes.

Appropriate corrective action, disciplinary or otherwise, up to and including removal, will be taken against any NIGC supervisor or other management official

who fails to perform his/her obligations as set forth in this chapter, including any unreasonable failure to report known violations of this policy.

e. Maintaining confidentiality, keeping records, and monitoring compliance.

- (1) **Maintaining confidentiality.** All reports of hostile or abusive conduct and related information will be maintained on a confidential basis to the greatest extent possible. The identity of the employee alleging violations of this chapter will be kept confidential, except as necessary to conduct an appropriate investigation into the alleged violations or when otherwise required by law.
- (2) **Writing reports and maintaining records.** A brief written report must be made to the Chief of Staff (or his/her deputy) regarding the final resolution of each allegation of hostile or abusive conduct under this chapter.
 - (a) These reports must identify the individuals implicated, the conduct involved, and the corrective action taken, if any. These records must be sufficient to aid the Chief of Staff (or his/her deputy) in determining how to address any future incidents.
 - (b) If requested by the Chief of Staff (or his/her deputy), written reports also may include a detailed description of the inquiry or investigation, an explanation of any conclusions, the reasoning for any corrective action issued, and/or any documents or other tangible evidence obtained during or created as a result of the inquiry or investigation.
 - (c) The Chief of Staff (or his/her deputy) shall maintain the written reports in a secure location. These written reports are protected by the Privacy Act, and will be maintained in accordance with its requirements and exemptions.
- (3) **Monitoring the procedures.** The Chief of Staff (or his/her deputy) must ensure that these procedures are properly executed by:
 - Monitoring inquiries and investigations under this chapter of reported or otherwise discovered hostile or abusive conduct;
 - Providing guidance concerning the information to be gathered and methods to be used during inquiries and investigations; and
 - Otherwise assuring that the investigations are swift, thorough, impartial, and appropriate to the allegation.
- (4) **Monitoring the work environment.** The Division Directors/General Counsel will be responsible for ensuring that their offices are in full

compliance with the requirements of this chapter. In addition, these officials are responsible for monitoring the work environment following a report alleging a violation of this chapter to ensure that there are no further violations or incidents of retaliation against any individual who has reported harassment or participated in the inquiry or investigation.

Section 6. PROCEDURES UNDER THIS CHAPTER ARE SEPARATE FROM STATUTORY CLAIMS.

a. Filing statutory or administrative complaints or grievances.

The purpose of this chapter is to stop harassment that has occurred and deter its occurrence in the future. Once management is satisfied that its corrective action has stopped harassment and deterred its recurrence, no further action is necessary. Therefore, corrective action under this chapter does not provide the remedies available in the EEO or other administrative or civil processes, such as compensatory damages. Filing a report under this chapter **does not** satisfy the requirements for filing an EEO complaint and obtaining remedies pursuant to the EEO process, **nor does it delay the time limits for initiating those procedures.** Thus, an NIGC employee who chooses to pursue statutory or administrative remedies for unlawful harassment **must** select one of the available forums as follows:

- (1) For an EEO complaint pursuant to 29 C.F.R. § 1614 (available for all claims of harassment other than those based on sexual orientation), contact an EEO counselor within 45 days from the most recent incident of alleged harassment (or personnel action if one is involved); or
- (2) For an MSPB appeal pursuant to 5 C.F.R. § 1201.22, file a written appeal with the Board within 30 days of the effective date of an appealable adverse action as defined in 5 C.F.R. § 1201.3, or within 30 days of the date of receipt of the agency's decision, whichever is later.

b. Reporting hostile or abusive conduct raised in the statutory or administrative process.

This chapter is designed to address hostile or abusive conduct before it rises to the level of illegal discrimination for which an employee can exercise the statutory right to file an EEO complaint or MSPB appeal. Its purpose is to ensure that NIGC management is notified of, and has the opportunity to correct, any hostile or abusive conduct, and applies whether or not the employee has filed an EEO complaint or MSPB appeal. The NIGC's liability for an EEO complaint or other action may depend upon whether it was aware of and promptly corrected the hostile or abusive conduct.

- (1) If an employee pursues a claim of harassment through the EEO process or an MSPB appeal, the NIGC official who receives notice of such claim shall promptly notify the appropriate responsible management official. The management official must treat the notice as a report under Section 5 of these procedures, unless inconsistent with applicable regulatory or statutory requirements.
- (2) The Chief of Staff (or his/her deputy) shall provide the record of actions taken under this chapter to the EEO office handling a parallel statutory or administrative claim.

Section 7. DISTRIBUTION.

This chapter shall be distributed to all NIGC employees upon issuance. It shall also be distributed to all new NIGC employees as part of their orientation during their first week of work. This chapter also will be made available to employees via the NIGC's intranet.

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